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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 694

ANNA M. VICTOR AND EDWARD H. GREEN, AS TRUSTEE UNDER THE WILL OF ROYALL VICTOR, DECEASED, PETITIONERS

v.

PHILIP B. FLEMING, TEMPORARY CONTROLS ADMINISTRATOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the United States Emergency Court of Appeals (R. 154–159) has not yet been reported.

JURISDICTION

The judgment of the United States Emergency Court of Appeals was entered on October 16, 1946 (R. as certified, 208). The petition for a writ of certiorari was filed in this Court on November 13, 1946. The jurisdiction of this

Court is invoked under Section 204 (d) of the Emergency Price Control Act (50 U. S. C. App., Supp. V, Section 924 (d)) making applicable Section 240 of the Judicial Code, as amended (28 U. S. C. 347).

QUESTIONS PRESENTED

1. Were the petitioners deprived of their property without due process of law in violation of the Fifth Amendment by the failure of the Rent Director for the New York City Defense-Rental Area to afford them a fair hearing before he issued orders reducing the maximum rents on their remodelled housing accommodations, where the petitioners were subsequently given a fair hearing by the Price Administrator on a protest filed by them to such orders?

2. Does Section 2 (b) of the Emergency Price Control Act require that the Administrator, in adjusting the maximum rent for particular housing accommodations after they have been remodelled, fix the maximum rent at a level which will assure to the individual landlord a fair return on that part of his investment represented by the increases in the costs of remodelling over similar costs prevailing on March 1, 1943?

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942, as amended (herein sometimes termed "the Act"), the Rent Regula-

tion for Housing for the New York City Defense-Rental Area (herein sometimes termed "the Rent Regulation"), and Revised Procedural Regulation No. 3, are set forth in the Appendix, *infra*, pp. 12–18.

STATEMENT

The Rent Regulation for Housing in the New York City Defense-Rental Area establishes as the maximum rents for housing accommodations rented on March 1, 1943 the rents in effect on that date (Section 4 (a), *infra*, p. 15). For accommodations first rented after that date, the first rent charged by the landlord himself becomes the maximum rent (Section 4 (e), *infra* p. 15). To prevent excessive maximum rents from being charged for accommodations first rented after March 1, 1943, and to put the owner of such accommodations in substantially the same position as owners of accommodations already rented on that date, the Rent Regulation authorizes the reduction of such a rent to the level of the rent which prevailed generally for comparable accommodations in the Area on the maximum rent date (Section 5 (c) (1), *infra*, p. 16). For housing accommodations which were remodelled after the maximum rent date, as in this case, the Rent Regulation further provides that there shall be added to the maximum rent otherwise fixed an amount which makes appropriate allowance for general increases in construction costs which occurred during the period from the maximum rent date to the date of

completion of the remodelled accommodations (Section 5, *infra*, pp. 15–16). The changes in the maximum rents are effected through proceedings before Rent Directors, who are in charge of the local area rent offices, and whose determinations may be protested in accordance with the provisions of Revised Procedural Regulation No. 3, *infra*, pp. 16–18, and Section 203 of the Act, *infra*, pp. 13–14.

Petitioners are the owners of a remodelled structure, situated at 345 West 87th Street, New York City, which contains ten apartments (R. 3–4, 46–61).[1] The structure was originally a private dwelling and was converted to apartment units during August–October 1944. The apartments were thereafter rented at rentals ranging from

[1] At petitioners' request and by stipulation of the parties, which petitioners have not included in the Record, certain portions of the certified Record were not printed. The Record, as printed, consists of two volumes, one containing only the transcript of proceedings before the Price Administrator and the opinion of the court below, and the other additional evidence presented directly to the court below. The first volume has only the original pagination, and the other no pagination whatsoever. Except where otherwise indicated, the Record references herein are not to the certified Record on file with the Clerk of this Court. References to the first volume of the printed Record containing the transcript of the proceedings before the Price Administrator will be designated as "R" followed by the appropriate original page number. References to the second volume containing the additional evidence will be designated "A. E." followed by the appropriate page number had the pages of that volume been numbered *seriatim* beginning with number 1.

$65 to $100 per month (R. 4, 128–131). These rents, which, under Section 4 (e) of the Rent Regulation, became the maximum rents, were found to be in excess of the rents generally prevailing in the Area for comparable accommodations on March 1, 1943, and were consequently reduced by orders of the Rent Director to amounts ranging from $45 to $70 per month. Before this action was taken petitioners were notified that it was contemplated, and they were given an opportunity to file objections. (R. 132–139, 148–152.)

Petitioners then filed a protest with the Price Administrator against the orders of the Rent Director (R. 1–9). During the protest proceeding, evidence was introduced bearing upon the rentals generally prevailing for comparable accommodations in the Area on March 1, 1943, and upon general increases in costs of construction in the Area after that date (R. 39–63, 78–98). Copies of this evidence were served upon petitioners who were provided an opportunity to present rebuttal and other relevant evidence, and of which petitioners availed themselves (R. 24–34, 64–70, 72–77, 99–113). Thereafter, the Administrator issued an order denying the protest together with an opinion stating the reasons for denial (R. 117–127).

Petitioners thereupon filed a complaint in the United States Emergency Court of Appeals in which they contended that: (1) The maximum rents established for their accommodations were

invalid for lack of a fair hearing in the proceedings before the Rent Director (R. as certified, 154–161); (2) the Rent Regulation was invalid because it provided for making allowance only for expenditures occasioned by increases in costs of construction from March 1, 1943, rather than from 1941; and (3) the Rent Regulation was not in conformity with Section 2 (b) of the Act because it did not allow petitioners a "fair return" on that portion of their investment which represented expenditures occasioned by increases in construction costs. The court below dismissed the complaint, holding (1) that the failure of the Rent Director to afford the petitioners a fair hearing did not prejudice them in their procedural rights, since they later received a fair hearing in the protest proceedings, (2) that the Administrator had not used an improper date as a basis for determining increases in construction costs, and (3) that the Act did not require the Administrator, in making allowance for increased costs of construction, to assure each landlord a fair return on that portion of his investment which represented expenditures occasioned by such increased costs.

ARGUMENT

1. Petitioners urge that the court below erred in holding that their procedural rights under the Fifth Amendment were not violated in this case by the failure of the Rent Director to afford

them a fair hearing before he issued the orders which reduced the maximum rents on their apartments. It is clear that the failure of the Rent Director to afford the petitioners a fair hearing before issuing the maximum rent orders in this case did not prejudice them in either their procedural or substantive rights. In the subsequent protest proceedings the petitioners were given a fair hearing,[2] during the course of which there was introduced and served upon the petitioners

[2] The petition contains intimations that the hearing afforded to the petitioners in the protest proceeding was not fair on the alleged ground that the protest did not receive the *de novo* consideration of the Price Administrator. See *Ladner* v. *Bowles*, 142 F. 2d 566 (E. C. A.). In the court below petitioners urged this point strenuously, alleging that the Price Administrator approved rentals identical in amount to those established initially by the Rent Director despite the fact that the Rent Director did not make allowances for increased construction costs. To support that allegation, petitioners relied upon the additional evidence consisting of confidential reports (A. E. 3–25), which were reproduced and presented to the court below by respondent at the petitioners' request. Although the rejection of the foregoing contention by the court below is not advanced as an independent ground for granting certiorari, it may be noted that (1) the Rent Examiner's Reports (A. E. 7, 9, 11, 12, 15, 17, 19, 21, 23, 25) disclose that the maximum rents recommended by him and followed by the Rent Director show attention to the matter of construction cost increases; and (2) the maximum rents recommended to the Examiner and Rent Director by the Rent Inspector were stated in terms of a range rather than a specific maximum rent thereby leaving ample margin for the Price Admin-

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the substance of the very evidence with which they claimed the Rent Director should have provided them if the hearing before the Rent Director was to be deemed fair. After such fair hearing the Price Administrator determined *de novo*[3] that the maximum rents should be established at the levels fixed by the Rent Director. This determination of the Administrator was reviewed by the court below and upheld. Consequently, the failure of the Rent Director in the first instance to give petitioners a fair hearing was corrected (assuming *arguendo* that they had a right to such a hearing), and that failure could not, therefore, adversely or illegally affect any of their rights which are protected by the Fifth Amendment.

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istrator to approve maximum rents identical to those established by the Rent Director but nevertheless including proper allowance for construction cost increases (A. E., bottom of pages 6, 8, 10, 13, 14, 16, 18, 20, 22, 24). This is attested to in the formal affidavit of the Inspector (R. 45–63).

[3] It should be observed that in accordance with the established administrative practice the Administrator, had he finally determined in the protest proceedings that higher maximum rents were warranted, would have revoked the orders of the Rent Director and made the higher rents effective as of the date of the Director's orders (R. 35–38, 157–158). III Op. & Dec. (OPA 1945) 3341; IV Op. & Dec. (OPA 1946) 3079, 3083–3084, 3153. This practice was approved in *Ambassador Apartments, Inc.* v. *Porter*, Emergency Court of Appeals, No. 310, decided October 16, 1946 (Not yet reported). See also *Direct Realty Co.* v. *Porter*, 157 F. 2d 434, 440 (E. C. A.).

Furthermore, it is well settled that the Fifth Amendment does not require a hearing before administrative action is taken, so long as adequate opportunity is subsequently afforded persons subject to such action to secure review thereof. *Bowles* v. *Willingham et al.*, 321 U. S. 503; *Yakus* v. *United States*, 321 U. S. 414; *Phillips* v. *Commissioner of Internal Revenue*, 283 U. S. 589; *Adams* v. *Milwaukee*, 228 U. S. 572; *North American Cold Storage Co.* v. *Chicago*, 211 U. S. 306; *Lawton* v. *Steele*, 152 U. S. 133; *Springer* v. *United States*, 102 U. S. 586. In *Bowles* v. *Willingham, supra,* in which an individual landlord sought to enjoin the issuance of an order of a Rent Director reducing a maximum rent found to be excessive, as in this case, this Court held that the judicial review provisions of the Act satisfied the requirements of the Fifth Amendment. Petitioners in this case not only obtained such judicial review, but, in accordance with the provisions of Section 203 of the Act, also obtained administrative review of the Rent Director's orders and a *de novo* determination by the Price Administrator.[4]

[4] It is clear, of course, that the Act neither requires nor contemplates that there be a hearing before regulations or orders under the Act are issued. *Bowles* v. *Willingham et al., supra.* Instead the protest procedure was provided to afford administrative review after the issuance of such regulations and orders.

2. Petitioners also urge that the Emergency Court of Appeals erred in holding that Section 2 (b) of the Act does not require that a maximum rent fixed for particular accommodations, remodelled after the maximum rent date, assure the individual landlord a fair return on that portion of his investment representing expenditures occasioned by increases in costs of construction.[5]

The question thus presented by petitioners has already been decided by this Court. In *Bowles* v. *Willingham et al., supra,* this Court, citing with approval the decision of the Emergency Court of Appeals in *Wilson* v. *Brown,* 137 F. 2d 348, ruled that the Act does not require the Administrator to fix maximum rents which will assure each individual landlord a fair return on his total investment. It follows, *a fortiori,* that the Act does not require the Administrator to assure an individual landlord a fair return upon the particular portion of his investment represented by expenditures occasioned by the increased costs of construction.

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[5] Petitioners also urge that the Emergency Court of Appeals erred in holding that Section 2 (b) does not require that the increases in costs of construction to be allowed for, be measured from 1941—the time when petitioners allege "there last was general construction in the Area" (Pet. 7)—rather than from March 1, 1943, the maximum rent date. As pointed out by the Court below (R. 155, 156) this contention is based upon a misconception of the statutory purposes and is contrary to the language of Section 2 (b).

CONCLUSION

The decision of the court below is correct and does not warrant further review. The petition should therefore be denied.

Respectfully submitted.

GEORGE T. WASHINGTON,
Acting Solicitor General.
JOHN R. BENNEY,
Attorney.

CARL A. AUERBACH,
General Counsel,
HARRY H. SCHNEIDER,
Assistant General Counsel,
ELI A. GLASSER,
Attorney,
Office of Price Administration,
Office of Temporary Controls.

DECEMBER 1946.

APPENDIX

I. The pertinent provisions of the Emergency Price Control Act of 1942 (56 Stat. 23), as amended by the Stabilization Extension Act of 1944[1] (58 Stat. 632) (50 U. S. C. App., Supp. V, 901 et seq.), are as follows:

> SEC. 2. (b) Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he shall issue a declaration setting forth the necessity for, and recommendations with reference to, the stabilization or reduction of rents for any defense-area housing accommodations within a particular defense-rental area. If within sixty days after the issuance of any such recommendations rents for any such accommodations within such defense-rental area have not in the judgment of the Administrator been stabilized or reduced by State or local regulation, or otherwise, in accordance with the recommendations, the Administrator may by regulation or order establish such maximum rent or maximum rents for such accommodations as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum rent for any defense-area

[1] Roman type is used to indicate text which has not been changed since original enactment or issuance and italics are used to indicate amendments.

housing accommodations, the Administrator shall ascertain and give due consideration to the rents prevailing for such accommodations, or comparable accommodations, on or about April 1, 1941 (or if, prior or subsequent to April 1, 1941, defense activities shall have resulted or threatened to result in increases in rents for housing accommodations in such area inconsistent with the purposes of this Act, then on or about a date (not earlier than April 1, 1940), which in the judgment of the Administrator, does not reflect such increases), and he shall make adjustments for such relevant factors as he may determine and deem to be of general applicability in respect of such accommodations, including increases or decreases in property taxes and other costs *within such defense-rental area.*[2]

SEC. 203. (a) *At any time after the issuance of any regulation or order under section 2, or in the case of a price schedule, at any time after the effective date thereof specified in section 206,*[3] any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in sup-

[2] Added by sec. 102 of the Stabilization Extension Act of 1944.

[3] As amended by sec. 106 of the Stabilization Extension Act of 1944. Formerly read, in place of italicized language: "Within a period of sixty days after the issuance of any regulation or order under section 2, or in the case of a price schedule, within a period of sixty days after the effective date thereof specified in section 206."

port of such objections.[4] Statements in support of any such regulation, order, or price schedule may be received and incorporated in the transcript of the proceedings at such times and in accordance with such regulations as may be prescribed by the Administrator. Within a reasonable time after the filing of any protest under this subsection, but in no event more than thirty days after such filing,[5] the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice.

II. Pertinent provisions of the Rent Regulation for Housing for New York City Defense-Rental Area (8 F. R. 13914) as amended:

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[4] As amended by sec. 106 of the Stabilization Extension Act of 1944. At this point the following language was stricken out: "At any time after the expiration of such sixty days any persons subject to any provision of such regulation, order, or price schedule may file such a protest based solely on grounds arising after the expiration of such sixty days."

[5] As amended by sec. 106 of the Stabilization Extension Act of 1944. At this point the following language was stricken out: "or ninety days after the issuance of the regulation or order (or in the case of a price schedule, ninety days after the effective date thereof specified in section 206) in respect of which the protest is filed, whichever occurs later."

SEC. 4. *Maximum rents.* Maximum rents (unless and until changed by the Administrator as provided in section 5) shall be:

(a) *Rented on March 1, 1943.* For housing accommodations rented on March 1, 1943, the rent for such accommodations on March 1, 1943.

* * * * *

(e) *First rent after November 1, 1943.* For (1) newly constructed housing accommodations without priority rating first rented on or after November 1, 1943, or (2) housing accommodations changed on or after November 1, 1943 so as to result in an increase or decrease of the number of dwelling units in such housing accommodations, or (3) housing accommodations not rented at any time between December 31, 1942 and November 1, 1943, or (4) housing accommodations changed on or after November 1, 1943 from unfurnished to fully furnished, the first rent for such accommodations after the change or on or after November 1, 1943, as the case may be. Within 30 days after so renting the landlord shall register the accommodations as provided in section 7. The Administrator may order a decrease in the maximum rent as provided in section 5 (c).

SEC. 5. *Adjustments and other determinations.* In the circumstances enumerated in this section, the Administrator may issue an order changing the maximum rents otherwise allowable or the minimum services required. * * *

In * * * cases [involving reductions under paragraph c (1)] * * * the adjustment shall be on the basis of the rent which the Administrator finds was generally prevailing in the defense-rental area for

comparable housing accommodations on March 1, 1943.

In cases involving construction, due consideration shall be given to general increases in costs of construction, if any, in the defense-rental area since March 1, 1943.[6]

* * * * *

(c) *Grounds for decrease of maximum rent.* The Administrator at any time, on his own initiative or on application of the tenant, may order a decrease of the maximum rent otherwise allowable, only on the grounds that:

(1) *Rent higher than rents generally prevailing.* The maximum rent for housing accommodations under paragraph (c), (d), (e), or (g) of section 4 is higher than the rent generally prevailing in the defense-rental area for comparable housing accommodations on March 1, 1943.

III. Pertinent provisions of Revised Procedural Regulation No. 3 (8 F. R. 526) (Procedure for adjustments, amendments, protests, and interpretations under rent regulations):

SUBPART A—LANDLORDS' PETITIONS AND TENANTS' APPLICATIONS

§ 1300.207 *Action by rent director on his own initiative.* In any case where the

[6] This paragraph was in force at time of remodeling of petitioners' units (August–October, 1944). By Amendments 21 and 27, issued on November 23, 1945 and May 27, 1946, respectively, this paragraph was changed to read: "In cases involving construction, appropriate allowance shall be made for general increases in costs of construction in the defense-rental area since 1939, except that in the case of construction initiated prior to November 23, 1945, such allowance shall reflect general increases in costs of construction in the defense-rental area since March 1, 1943."

rent director pursuant to the provisions of a maximum rent regulation, deems it necessary or appropriate to enter an order on his own initiative, he shall, before taking such action, serve a notice upon the landlord of the housing accommodations involved stating the proposed action and the grounds therefor. The proceeding shall be deemed commenced on the date of issuance of such notice.

§ 1300.208 *Action by the rent director on petitions for adjustment or other relief.*

* * * * *

(b) An order entered by a rent director upon a petition for adjustment or other relief, or an order entered by a rent director on his own initiative, shall be effective and binding until changed by further order and shall be final subject only to application for review or protest as provided in §§ 1300.209 and 1300.210 and §§ 1300.216 to 1300.242, inclusive, of this regulation. An order entered by a rent director may be revoked or modified at any time upon due notice to the petitioner.

* * * * *

SUBPART C—PROTESTS

General Provisions

§ 1300.216 *Right to protest.* Any landlord subject to any provision of a maximum rent regulation, or of an order issued under § 1300.210 of this regulation, or of an order entered under section 5 (d) of any maximum rent regulation, or of an order entered by the rent director under § 1300.207 of this regulation, may file a protest in the manner set forth below.

* * * * *

§ 1300.224 *Action by the Administrator on protest.* (a) Within a reasonable time

after the filing of any protest in accordance with this revised procedural regulation, but in no event more than thirty days after such filing, the Administrator shall:

(1) Grant or deny such protest in whole or in part;

(2) Notice such protest for hearing of oral testimony in accordance with §§ 1300.228 or 1300.232 of this revised procedural regulation;

(3) Notice such protest for hearing of oral argument by a board of review in accordance with § 1300.236;

(4) Provide an opportunity to present further evidence in connection with such protest. Within a reasonable time after the presentation of such further evidence, the Administrator may notice such protest for hearing of oral testimony in accordance with subparagraph (2) of this section, notice the protest for hearing of oral argument by a board of review in accordance with subparagraph (3) of this section, include additional material in the record of the proceedings on the protest in accordance with §§ 1300.230 and 1300.231 of this revised procedural regulation, or take such other action as may be appropriate to the disposition of the protest.

(b) Notice of any such action taken by the Administrator shall promptly be served upon the protestant.

(c) Where the Administrator has ordered a hearing on a protest or has provided an opportunity for the presentation of further evidence in connection therewith, he shall, within a reasonable time after the completion of such hearing or the presentation of such evidence, grant or deny such protest in whole or in part.

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